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SUPREME COURT, U.S.

No. 97-1472

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

MICHAEL A. HADDLE,
Petitioner,

v.

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, individually and as Trustee for certain trusts, and JOHN DOES I through N, individually and as Trustees of certain trusts,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

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BRIEF ON THE MERITS OF RESPONDENT G. PETER MOLLOY, JR.

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QUESTION PRESENTED

Whether an at-will employee who alleges that his employment was terminated pursuant to a conspiracy to retaliate against him for appearing, but not testifying, before a grand jury and to deter him and others from appearing and testifying as witnesses in federal court, has been "injured in his person or property" under 42 U.S.C. Section 1985?

LIST OF PARTIES

The parties to the proceeding are all named in the caption hereof.

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STATEMENT OF THE CASE

Petitioner Haddle filed an action in the District Court for the Southern District of Georgia asserting one federal claim under 42 U.S.C. Section 1985(2) and several state law claims against Respondents Jeanette Garrison, Healthmaster, Inc. (n/k/a "HLM"), G. Peter Molloy, Dennis Kelly and others. Respondents Garrison and HLM filed Motions to Dismiss which Respondents Molloy and Kelly joined. The District Court dismissed Haddle's 42 U.S.C. Section 1985(2) claim under the binding precedent of the Eleventh Circuit's holding in Morast v. Lance, 807 F.2d 926 (11th Cir. 1987). The District Court also dismissed Haddle's state law claims without prejudice after declining to exercise supplemental jurisdiction over them. Haddle appealed to the United States Court of Appeals for the Eleventh Circuit which issued an opinion and judgment adverse to him on December 5, 1997. Haddle timely filed a Petition for a Writ of Certiorari to this Court.

Petitioner Haddle did not appeal the dismissal of his state law claims. He re-filed his state law claims in the Superior Court of Richmond County, Georgia, in an action captioned Haddle v. Garrison, et al., Civil No. 96-RCCV-572. The Richmond County Superior Court subsequently granted summary judgment to all defendants on all claims asserted by Petitioner. The Georgia Court

of Appeals affirmed the grant of summary judgment. The Court of Appeals affirmed the grant of summary judgment and denied Petitioner's Motion for Reconsideration. (Respondents' Motion to Dismiss Writ of Certiorari as Improvidently Granted, P. 3.)

The District Court dismissed Petitioner's case on a Motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure without considering any evidence outside of the pleadings. Therefore, the relevant facts are the allegations contained in Petitioner's amended complaint (J.A. 17-28) which must be taken as true for this review.

From September 22, 1986 until approximately April 13, 1995, Haddle was an employee of HLM. (J.A. 19, Paras 7&9). On March 8, 1995, Garrison, HLM and others, but not Molloy, were indicted in the United States District Court for the Southern District of Georgia. (J.A. 19, Para. 12). In April 1995, Healthmaster Home Health Care, Inc. ("HHHC"), a wholly owned subsidiary of HLM filed for protection under Chapter 11 of the Bankruptcy Code. (J.A. 19, Para 9). In connection with the bankruptcy proceeding, most of the employees of HLM, including Haddle and Molloy, transferred their employment to HHHC. (J.A. 19, Paras 8 & 9). The Bankruptcy Court appointed a Trustee to oversee the affairs of HHHC. The Bankruptcy Court-appointed Trustee elected to retain Respondent Molloy as the President of HHHC. (J.A. 20, Para 16).

During the investigation that led up to the indictment of HLM and others, and the subsequent bankruptcy filing, Haddle alleges that he cooperated with federal agents. Haddle was subpoenaed to go before the grand jury but admits that he did not testify due to the press of time. (J.A. 20, Para 14). Haddle does not allege that he was a party to the criminal case brought against HLM and others, or any other federal proceeding; he only alleges that he was to be a potential witness in the criminal case against others.

On June 21, 1995, Molloy, then president of HHHC, with the approval of the Bankruptcy Trustee, terminated Haddle's employment with HHHC. (J.A. 20, Para 16). Haddle alleges that Molloy terminated Haddle's employment on the instructions of Jeanette Garrison, Kelly, and HLM in retaliation for Haddle's purported cooperation in the criminal investigation and in an attempt to intimidate Haddle from testifying in the federal criminal trial against others. (J.A. 20, Para 16). Petitioner did not allege that he was threatened with force or violence by any of Respondents or that the Government ever investigated or charged any of Respondents with obstruction of justice.

Petitioner includes in his Petition and Brief factual allegations regarding testimony by Robert Pittard and rulings in the case of O'Neal v. Master Health Plan, Inc. No. 96-028 (S.D.Ga.).

(Petitioner's Brief at P.5 &6). Although none of the references to Mr. Pittard or the O'Neal case are part of the record, Petitioner argues that this Court may take judicial notice of matters in the public record which support the allegations of his Petition. (Petitioner's brief, P 5). However, this Court has repeatedly held that parties may only rely on, and the Court may only consider, information that is part of the record. Witters v. Washington Department of Services for the Blind, 474 U.S. 481, 486 n.3 (1986).

Assuming, however, that this Court chooses to consider the O'Neal case, it does not support Haddle's allegations against Respondent Molloy. Instead the O'Neal case supports Respondent Molloy because the trial court granted judgment as a matter of law to Molloy on the claim that Molloy had been involved in terminating O'Neal's employment. Trial Judge Anthony J. Alaimo expressly ruled:

> Well, I do not know of any evidence that tied him [Molloy] into the discharge or the placing on administrative leave. So I am going to grant that motion. ... He was just purely a message carrier. Under the evidence that I have heard here, that is all he was. ... There is no evidence whatever that he participated in the employment decision

> to discharge him or put him on administrative leave. [Tr (Vol 3): 215-216].

The O'Neal case is not proof that Respondent Molloy engaged in a conspiracy to injury Haddle or O'Neal. The case is a factual finding by the District Court Judge that Respondent Molloy did not engage in any wrongful conduct.

SUMMARY OF ARGUMENT

A. Petitioner Haddle was not "injured in his person or property" within the meaning of 42 U.S.C. Section 1985 as a result of the termination of his at-will employment. In interpreting the other post Civil War Civil Rights statutes enacted with Section 1985, this Court has consistently held employees do not have a property interest in their at-will employment.

B. This Court's decisions that at-will employment is not "property" under the Due Process Clause are consistent with the understanding of employment rights at the time of passage of the post Civil War Civil Rights Acts. At-will employment was interpreted then to mean that the employer had the unlimited right to dismiss his employees for any reason without government interference. The Court echoed this widely held view in its

decision Adair v. United States, 200 U.S. 161 (1908).

C. The plain language of 42 U.S.C. Section 1985 does not support a claim based on the termination of at-will employment. There is no reference in the statute to protection of at-will employment. The term "employment" does not even appear in the statute.

D. Petitioner has no property interest in his at-will employment under Georgia law. Where an employee's employment is at-will, an employer with or without cause and regardless of its motive may discharge the employee without liability.

E. Congress uses explicit language when it wishes to protect an interest. Congress has not used language to demonstrate that it intended to protect at-will employment in Section 1985. Congress has passed other statutes which do afford protection to at-will employees.

F. Petitioner is not a proper party to raise a claim under Section 1985(2). This statute exists for the benefit of litigants whose ability to present an effective case in federal court has been hampered. It is the party's interest in being able to fully litigate his case in a federal court that is the protected federal interest. A

witness such as Petitioner as no such interest.

ARGUMENT

I. Petitioner Was Not "Injured in His Person or Property" Within the Meaning of 42 U.S.C. Section 1985 as a Result of the Termination of His At-Will Employment.

Petitioner Haddle brings this claim under 42 U.S.C. Section 1985 which requires that a party be "injured in his person or property." 42 U.S.C. Section 1985(3). This Court has consistently held that property rights are not implicated as a result of the termination of at-will employment. Although this Court has not yet addressed the limits of injury to "person or property" under Section 1985(3), it has held that the term "property" does not encompass termination of at-will employment in interpreting the other civil rights statutes enacted with 42 U.S.C. Section 1985. To expand the concept of "property" under 42 U.S.C. Section 1985(3) to include termination of at-will employment would be inconsistent with this Court's interpretation of "property" in the other civil rights statutes and with Congress's understanding of employment rights at the time 42 U.S.C. Section 1985 was enacted.

A. This Court Has Not Interpreted the Term "Property" in the Post Civil War Civil Rights Statutes to Encompass Termination of At-Will Employment.

The statute in this case, 42 U.S.C. Section 1985, is part of the civil rights legislation that Congress passed after the Civil War. This post Civil War legislation also included other statutes which are now codified as 42 U.S.C. Sections 1981, 1982 and 1983. The statutes all either contain express protections of "property" or have been interpreted to protect "property".

42 U.S.C. Sections 1981 and 1982 originated in the Civil Rights Act of 1866. 42 U.S.C. Sections 1983 and 1985 originated in the Civil Rights Act of 1871. There is no basis for interpreting the definition of "property" differently under Section 1985 than under Sections 1981, 1982 or 1983. It makes sense that the same term used in these statutes should be interpreted the same way. In Tillman v. Wheaton - Haven Recreation Association, Inc. 410 U.S. 431, 440 (1973), this Court stated that "...in light of the historical inter- relationship

between Section 1981 and Section 1982, we see no reason to construe the sections differently when applied... ."

Section 1981, as originally enacted, provided:

> All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

(Emphasis added).

This Court has previously held that 42 U.S.C. Section 1981 does prohibit discrimination in employment matters. However, this Court also held that such protection did not fall under the "persons and property" (emphasis added) portion of the statute but under the "make and enforce contracts" clause. Runyon v. McCreary, 427 U.S. 160, 168 (1976).

This Court also made clear that the "persons and

property" clause of Section 1981 does not apply to termination of at-will employment in Patterson v. McLean Credit Union, 491 U.S. 164 (1989). In Patterson, a black former employee of a credit union brought suit under Section 1981 claiming racial harassment and other job discrimination. This Court held that Section 1981 did prohibit racial discrimination in making and enforcing private contracts. However, the Court further held that racial harassment in the course of employment is not actionable under Section 1981 because the statute covers only conduct at the initial formation of the contract and conduct which interferes with the right to enforce contractual obligations through legal process. The Court especially held that Section 1981 did not encompass the termination of employment. 491 U.S. at 177.

After Patterson, Congress passed Section 101 of the Civil Rights Act of 1991 which added the following provision to 42 U.S.C. Section 1981:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination

> of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

42 U.S.C. Section 1981(b). (Emphasis added.)

Runyon and Patterson make it clear that this Court never interpreted Section 1981 to address the termination of employment. Congress recognized that employment was not a protected property interest under 42 U.S.C. Section 1981 when it amended the statute in 1991 to add protection against termination of employment.

42 U.S.C. Section 1982 provides:

> All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Courts have consistently held that 42 U.S.C. Section 1982 does not protect termination of employment. Jurado v.

Eleven-Fifty Corporation, 630 F.Supp. 569, 572, aff'd 813 F.2d 1406 (9th Circuit, 1987); Abel v. Bonfanti, 625 F.Supp. 263, 269 (S.D.N.Y. 1985).

Section 42 U.S.C. Section 1983 in relevant part provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress... .

Although Section 1983 does not specifically refer to "property," it has been long acknowledged that Section 1983 encompasses the rights provided by Section 1 ("the Due Process Clause") of the Fourteenth Amendment. That Clause

states that no person shall be deprived of "...life, liberty or property, without due process of law... ."

In Lynch v. Household Finance Corporation, 405 U.S. 538 (1972), this Court traced the origin of Section 1983 to the Civil Rights Act of 1871 which was derived from the Civil Rights Act of 1866. 405 U.S. 543-544. The Court then went on to hold:

> Not only was Section 1 of the 1871 Act derived from Section 2 of the 1866 Act, but the 1871 Act was passed for the express purpose of "enforcing the Provisions of Fourteenth Amendment."

405 U.S. at 545.

The Court then stated:

> It cannot be doubted that among the Civil Rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy,

own and depose of property. The quality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of the other basic civil rights and liberties which the Amendment was intended to guarantee. Shelley v. Kramer, 334 U.S. 1 10, 68 S.Ct. 836, 841, 92 Law.Ed. 1161.

405 U.S. at 544.

This Court held that at-will employment does not create a property interest under 42 U.S.C. Section 1983 in Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). Roth was an assistant professor without tenured rights to continued employment who was informed that he would not be rehired after his first academic year. He filed suit under Section 1983 alleging that the University's decision, without a reason or a hearing, not to rehire him deprived him of his Fourteenth Amendment property rights. This Court expressly held that the professor did not have a property interest protected by the Fourteenth Amendment and dismissed his claim. In particular,

the Court held:

> Certain attributes of "property" interest protected by procedural due process emerge from these decisions. To have a property interest and a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.
>
> * * *
>
> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits

and that support claims of entitlement to those benefits.

* * *

Thus, the terms of the Respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or university rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the Respondent surely had an abstract concern of being re-hired, but he did not have a *property* interest sufficient to require the university to give him a hearing when they declined to renew his contract of employment.

408 U.S. at 577-578 (footnote omitted) (emphasis in original).

This Court also held that at-will employment does not create a protected property interest in Bishop v. Wood, 426 U.S. 341 (1976). In Bishop, a former police officer brought an action alleging that termination of his at-will employment without a hearing was a violation of due process. This Court rejected the police officer's claim that he had a property interest of continued employment protected by federal law and held:

> A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law.

426 U.S. at 345

> In this case, a holding that as a matter of state law the employee "held his position at the will and pleasure of the city" necessarily establishes that he had no property interest.

426 U.S. at 346, 345 n.8 (emphasis in original).

42 U.S.C. Section 1985(3) provides the damages for a violation of Section 1985(2). Section 1985(3) states in relevant part that if a person is:

> ...injured in his person or property, ...the party so injured or deprived may have an action for the recovery of damages occasioned by such injury... ."

In Morast v. Lance, 807 F.2d 926, the Eleventh Circuit held that a discharged vice-president of a national bank, who was an at-will employee, had no constitutionally protected interest in continued employment and therefore did not suffer an injury to his person or property as required by Section 1985.

Other courts, in addition to the Eleventh Circuit, have found that injury to "person or property" under 42 U.S.C. Section 1985 does not encompass termination of at-will employment. In Gill v. The Farm Bureau Life Insurance Company of Missouri, 906 F.2d 1265 (8th Cir. 1990), the Court rejected a claim brought by an insurance agent under Section 1985 based upon the termination of his agency relationship with the defendant insurance company. The

Eighth Circuit noted that:

> ...Gill's contracts themselves contain express provisions permitting cancellation upon written notice. These cancellation clauses constitute a second sufficient and independent ground for denying recovery to appellant Gill.

906 F.2d at 1269-1270.

In Perkins v. Silverstein, 939 F.2d 463 (7th Cir. 1991), former probationary police officers brought an employment discrimination suit under 42 U.S.C. Section 1983 and Section 1985 and other statutes. The Seventh Circuit dismissed the Plaintiffs' Section 1983 and Section 1985 claims because "...Plaintiffs failed to identify a protected property or liberty interest in their employment... ." 939 F.2d at 466.

In light of this Court's decisions that Section 1981, Section 1982, and Section 1983 do not protect at-will employment, Petitioner's reliance on Irizarry v. Queros, 722 F.2d 869 (1st Cir. 1983) and Portman v. County of Santa Clara,

995 F.2d 898 (9th Cir. 1999) for the proposition that loss of at-will employment is loss of a property interest is not persuasive. The Court in Irizarry conclusarily stated that "property" would include "...any economic damage that would be recognized in an ordinary tort suit." 722 F.2d at 871. However, the Court did not explain how it arrived at this conclusion nor cite any authority for it.

The Portman Court acknowledged that it had not yet addressed the question of injury to property under Section 1985(2). However, the Court in Portman then failed to furnish any explanation or citation of authority for its conclusion that loss of at-will employment was a proper injury within the meaning of Section 1985. The Portman Court simply cited to Irizarry and Wright v. No. Skiter Inc., 774 F.2d 422 (10th Cir. 1985) and stated that it saw "no reason to depart from the approach of those cases... ." 995 at 910.

The unsupported conclusions in Portman and Irizarry are contrary to the meaning of "property" in the other post-Civil War civil rights statutes.

B. This Court's Decisions That At-will Employment

Is Not "Property" under the Due Process Clause Are Consistent with the Understanding of Employment Rights at the Time of Passage of the Post Civil War Civil Rights Acts.

Contrary to Petitioner's arguments, at-will employment was not consider a property right at the time of the passage of the Civil Rights Act of 1866 or the Civil Rights Act of 1871.

In 1877, the American commentator H. G. Wood, set forth his view of the law of at-will employment:

> With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will and if the servant seeks to make out a yearly hiring the burden is upon him to establish it by proof... . Unless the understanding was mutual that the service was extended for a certain fixed and indefinite period, it is an indefinite hiring and is terminable at the will of either party.

Wood, Law of Master & Servant, 272 (1877).

Adair v. United States, 200 U.S. 161 (1908), was a review of a conviction of an agent of an interstate carrier for discharging an employee from service to such carrier because of the employee's membership in a labor organization. This Court reversed Adair's conviction and held unconstitutional the legislation which limited the power of employers to discharge employees because of their membership in a labor organization. In Adair, Justice Harlan stated:

> ...It is not within the function of government - at least, in the absence of contract between the parties - to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another.
>
> * * *
>
> In all such particulars, the employer and

> employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.

208 U.S. at 280-281.

In Arnett v. Kennedy, 416 U.S. 134 (1974), Justice Rehnquist noted that:

> For almost the first century of our national existence, federal employment was regarded as an item of patronage, which could be granted, withheld, or withdrawn for whatever reasons might appeal to the responsible executive hiring officer. Following the Civil War, grass - roots sentiment for "Civil Service Reform" began to grow and it was apparently brought to a head by the assassination of President James A. Garfield on July 2, 1881.

416 U.S. at 148.

In sum, this Court's decisions and the legal commentators show that at the time of the passage of the Civil Rights Act of 1871, at-will employment was not considered "property" because the employer had the unlimited right to discharge an at-will employee.

C. The Plain Language of 42 U.S.C. Section 1985 Does Not Authorize a Claim Based on the Termination of At-Will Employment.

There is nothing in the plain language of 42 U.S.C. Section 1985 that demonstrates that Congress intended to provide a civil remedy for the termination of at-will employment. The statute makes reference to one who is "injured in his person or property".

There is no reference in the statute to termination of at-will employment let alone to the term "employment". Griffin v. Brekenridge, 403 U.S. 88 (1971) and Kush v. Rutledge, 460 U.S. 719 (1983) contained extensive discussions of the legislative history and purpose of Section 1985. Kush even

contains a full text of the original statute as an appendix. However, nowhere does the term "employment" appear.

D. Haddle Has No Property Interest in His At-will Employment under Georgia Law.

Haddle acknowledges that he was an at-will employee under Georgia law (Petitioner's Brief, P. 7). Section 34-7-1 of the Official Code of Georgia provides:

> If a contract of employment provides that wages are payable at a stipulated period, the presumption shall arise that the hiring is for such period, provided that, if anything else in the contract indicates that the hiring was for a longer term, the mere reservation of wages for a lesser time will not control. An indefinite hiring may be terminated at-will by either party. (Emphasis added)

In Runyon v. Economics Laboratory, Inc., 147 Ga.App. 53, 248 S.E.2d 44, 46 (1978) the Court held:

> Where an employee's employment is terminable at-will, an employer with or without cause and regardless of its motive, may discharge the employee without liability.

In Roth, this Court stressed that:

> Property interests, of course, are not created by the Constitution. Rather, they are created in the dimensions or defined by existing rules or understandings that stem from an independent source such as state law, rules or understanding that secure certain benefits and its support claims of entitlement to those benefits.

408 U.S. at 577-78.

In Nolin v. Douglas County, 903 F.2d 1546 (11th Cir. 1990), the Court in interpreting O.C.G.A. Section 34-7-1 held:

> Hence, under Georgia law an at-will employee "typically does not have a

> reasonable expectation of continued employment sufficient to form a protectable property interest." Wofford v. Glynn Brunswick Memorial Hospital, 864 F.2d 117, 119 (11th Cir. 1989) (per curiam).

903 F.2d at 1553.

E. When Congress Wishes to Prohibit Termination of At-will Employment, it Uses Explicit Language to Do So.

Petitioner asks this Court to search out a protection for at-will employment in the term "property" within the meaning of Section 1985. However, when Congress has sought to protect at-will employment, it has clearly done so. For example, Title VII, 42 U.S.C. Section 2000(E-3)(a); Americans With Disabilities Act, 42 U.S.C. Section 12203, False Claims Act, 31 U.S.C. Section 3730 (h); Age Discrimination and Employment Act, 29 U.S.C. Section 623(d); Fair Labor Standards Act, 29 U.S.C. Section 215(a)(3). The absence of any reference to protection of at-will employment in Section 1985 is an indication that Congress did not mean for that

statute to be a limitation on the right to terminate at-will employment.

F. Petitioner Is Protected by Other Adequate State and Federal Statutes.

Petitioner contends that if he is not allowed to bring a claim under 42 U.S.C. Section 1985, employers will be given a green light to intimidate and retaliate against their employees without fear of any legal recourse. Petitioner's implication is that Section 1985 is the only statute available to him. Without it, he has no remedy. However, such is not the case. There are already specific federal statutes available to protect at-will employees. A number of those are listed above in the preceding Sub-section E. In addition, federal criminal statutes such as 18 U.S.C. Section 1503 (Influencing or injuring officer or juror generally) already exist to deter employers from intimidating or retaliating against employees. Also, there are state laws and causes of action available to Petitioner such as Georgia's cause of action for tortious interference with a contract and the Georgia Racketeer Influenced and Corrupt Organizations Act (O.C.G.A. Section 16-14-6), both of which

Petitioner plead in his amended Complaint (J.A. 22 & 24).

II Petitioner Is Not a Proper Party to Raise a Claim under Section 1985(2).

Petitioner cites Portman v. County of Santa Clara, supra, from the Ninth Circuit, and Irizarry v. Quiros, supra, from the First Circuit, in support of his contention that Morast is wrongly decided. However, the Portman and Irizarry decisions are not helpful to Petitioner. Both these decisions involved injury to an underlying party in a federal proceeding. Petitioner was not a party in the underlying federal criminal case, he was only a witness. Section 1985(2) protects only parties to federal court proceedings.

Kush v. Rutledge, 460 U.S. 719 (1983), the seminal Section 1985(2) case, involved a party who alleged that his right to prevent an effective case in a federal proceeding had been injured by Defendants who had conspired to intimidate and threaten his witnesses.

The Ninth Circuit made the requirement of injury to a party in an underlying action absolutely clear in David v. United States, 820 F.2d 1038, 1040 (9th Cir. 1987). In David, the Section 1985(2) plaintiff claimed she had been discharged from employment because she acted as a witness in a separate federal court proceeding to which she had not been a party. The Court stated as follows:

> David has not alleged how she has been injured by her testimony in Parodi [the separate federal court proceeding] or her failure to appear in court. Allegations of witness intimidation under Section 1985(2) will not suffice for a cause of action unless it can be shown the litigant was hampered in being able to present an effective case. Id. Since David has not shown she was a party to the actions in which she was intimidated, she can show no injury under Section 1985(2).

820 F.2d at 1040. (Emphasis in original).

The Seventh Circuit has adopted the same position. In

Rylewicz v. Beaton Service, Ltd., et al., 888 F.2d 1175, at 1180 (7th Cir. 1989), citing Rode v. Dellarciprete, 845 F.2d 1195, (3rd Cir. 1988) and David, supra, the Seventh Circuit held:

> ...remedial Sections 1985(3) and 1986 have been held to give monetary relief only to a "party" and not a mere witness such as Mr. Cummings.

But see Brewer v. Rockwell International Corp., 40 F.3d 1119, 1125 (10th Cir. 1994) for a contrary position.

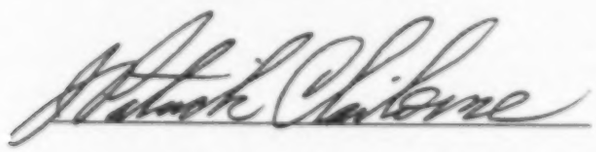
Petitioner was not a party to the underlying federal criminal case against Jeanette Garrison, HLM and Kelly upon which Petitioner bases his Section 1985(2) claim. Unlike the plaintiffs in Irizarry and Portman, Petitioner was only a witness, not a party, in the separate federal litigation. Because he was not a party to the separate federal proceeding, Petitioner's ability to present an effective case in federal court was not injured. Only parties have standing under the First, Seventh, and Ninth Circuits' approach to the issue because it is the interest in being able to fully litigate a party's case in the

federal courts that constitutes the protected federal interest. Petitioner had no such federal interest implicated; therefore, it was proper to dismiss his Section 1985(2) claim.

CONCLUSION

For the reasons set forth above, the decision of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,



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